INDEX

CITATIONS

467-894—72—1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE BOEING COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit insofar as it directs the Board to consider the reasonableness of otherwise valid union fines.

OPINIONS BELOW

The opinion of the court of appeals (App. 5a–33a) [1] is not yet reported. The decision and order of the National Labor Relations Board (App. 34a–46a) are reported at 185 NLRB No. 23.

[1] A petition to review this and other portions of the judgment of the court below has been filed by Booster Lodge No. 405, Int'l Assoc. of Machinists, No. 71–1417. To avoid needless duplication, we have not reprinted the material contained in the appendix to the petition in No. 71–1417; the "App." references are to that appendix.

JURISDICTION

The judgment of the court of appeals (App. 1a–3a) was entered on March 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, in determining whether a union committed an unfair labor practice by assessing and seeking court collection of a fine against a member for violating a valid union rule against strikebreaking, is required to determine whether the fine is reasonable in amount.[2]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .
>
> * * * * *

[2] This case does not involve any question with respect to whether a state court would enforce the fine in a suit for collection without regard to its reasonableness, or whether the imposition of an unreasonable fine might violate the procedural requirements of Section 101 of the Landrum-Griffin Act, 29 U.S.C. 411.

Sec. 8(b) It shall be unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 16, 1965, the day after the expiration of a collective bargaining agreement between the Union[3] and the Company,[4] the Union struck and picketed the Company's Michoud, Louisiana plant in furtherance of demands for a new contract (App. 35a; A. 85–86, 185).[5] During the next two or three weeks, while the strike was continuing, about 143 of the 1900 production and maintenance employees represented by the Union at Michoud crossed the picket line and went to work (App. 35a; A. 127, 154, 200, 234–239). All of the 143 employees had been members of the Union prior to the strike. About 119 resigned from the Union during the strike; 61 resigned before crossing the picket line and 58 went back to work before resigning from the Union. The remaining 24 made no attempt to resign. (App. 35a–36a; A. 128–132, 242–251.)

---

[3] Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO.

[4] The Boeing Company.

[5] "A." refers to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk.

The strike terminated on October 4, 1965, following ratification of a new contract by the Union membership (App. 35a; A. 85–86). In late October or early November, the Union notified all employees who had crossed the picket line, including those who had resigned their Union membership, that charges were being brought against them under the Union constitution. The constitution provided for the imposition of a fine or other discipline against a member who accepted "employment in any capacity in an establishment where a strike, or lockout exists as recognized under this constitution without permission." (App. 36a; A. 124, 183, 203, 214, 228.)

Fines were imposed on all strikebreaking employees, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial before the Union Trial Committee, and those who appeared and were found to have violated the constitutional prohibition, were fined $450 and barred from holding Union office for up to five years. (App. 36a; A. 86, 94, 101, 110–111, 137–138, 180–181, 230.) Early in 1966, the membership voted to reduce to 50 percent of strikebreaking earnings the fines of returning strikers who appeared for trial, apologized, and pledged loyalty to the Union. On this basis, the fines of 35 of the employees were reduced (App. 36a; A. 234–239).

In an attempt to enforce the fines, the Union sent letters to the employees stating that collections were being turned over to an attorney, that legal action would be taken to collect the fines, and that reduced fines would be returned to $450 in the event of non-

payment (App. 37a; A. 87, 111, 125–127, 231–233, 256). The Union also filed civil suits against several employees to collect the fines, plus attorney's fees and interest (App. 37a; A. 117, 128, 210–212, 240–241).[6] At the time of the Board's hearing none of the $450 fines and only a few of the reduced fines had been paid. (App. 37a; A. 127, 192, 234–239).

B. THE BOARD'S DECISION AND ORDER

Upon a charge filed by the Company, the Board held that the Union violated Section 8(b)(1)(A) of the Act by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work (App. 37a–42a). But, relying on *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Board held that fines imposed on members of the Union for their work activity while members did not violate the Act.

The Board dismissed the complaint insofar as it alleged that the fines levied against employees for work activity engaged in prior to their resigning from the Union violated Section 8(b)(1)(A) because they were unreasonable in amount (App. 42a–43a). The Board held that "the legality of union fines does not depend on their reasonableness" (App. 42a, n. 16). In so ruling, the Board followed its decision in *Int'l Ass'n of Machinists, Local Lodge No. 504 (Arrow Development Co.)*, 185 NLRB No. 22.[7] The Board there

[6] None of these suits has yet been resolved (App. 37a).

[7] Pending review, *sub nom. David O'Reilly* v. *National Labor Relations Board*, No. 26,892 (C.A. 9).

concluded that Congress' intention that the Board not intrude into internal union affairs could best be effectuated by interpreting "8(b)(1)(A)'s prohibitions [as] extend[ing] to union discipline imposed for certain prohibited purposes, but not [to] the severity of otherwise lawful discipline" (App. 55a); the latter issue, the Board held, is for the courts to determine in suits to collect the fines (App. 55a).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's holding that the Union violated Section 8(b)(1)(A) of the Act by fining employees who had resigned from the Union prior to crossing the picket line, and by fining those who had resigned after crossing for post-resignation work activity (App. 16a–22a). However, the court rejected the Board's conclusion that the reasonableness of the fines had no effect on their legality under the Act, holding that "the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A)" (App. 25a). The court therefore remanded the case to the Board to consider the reasonableness of those fines (App. 33a).

REASONS FOR GRANTING THE WRIT

The holding of the court below that "the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A)" (App. 25a) is erroneous; it thrusts on the Board a task traditionally undertaken by the courts and substantially alters the Board's responsibility under the National Labor Rela-

tions Act. Review of the issue by this Court is thus warranted.[8]

1. In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that a union does not violate Section 8(b)(1)(A) of the Act by fining those of its members who went to work during a lawful strike, and by seeking judicial enforcement of those fines. In so concluding, the Court essentially accepted the Board's position, enunciated in *Minneapolis Star and Tribune Co.*, 109 NLRB 727, that the legislative history of Section 8(b)(1)(A) and its proviso show that "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. This interpretation of Section 8(b)(1)(A), the Court added, is reinforced by the Landrum-Griffin Act of 1959, which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or other discipline, did not purport to overturn or modify the Board's interpretation of Section 8(b)(1)(A). *Allis Chalmers, supra*, 388 U.S. at 193–195. To hold that the Board has the responsibility for assessing the "reasonableness" of union discipline "is to say that Congress preceded the Landrum-Griffin amendments with an even more per-

[8] On March 20, 1972, the Court granted review in *National Labor Relations Board* v. *Granite State Joint Board*, No. 71-711, which presents the question whether it is a violation of Section 8(b)(1)(A) of the Act for a union to fine a member for returning to work during a strike, after he has resigned from the union.

vasive regulation of the internal affairs of unions." *Allis-Chalmers, supra,* 388 U.S. at 183.

Subsequent decisions have qualified *Allis-Chalmers* to this extent: if the union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *National Labor Relations Board,* 394 U.S. 423, 429; see also *National Labor Relations Board v. Marine Workers,* 391 U.S. 418. But, "[u]nless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield, supra,* 394 U.S. at 426, n. 3.

This Court having determined that fining members who engage in strikebreaking contrary to a union rule is not an unfair labor practice because it does not "invade * * * or frustrate * * * [any] overriding policy of the labor laws," the amount of such fine does not bring the Union's conduct within the proscription of the Act.

2. Requiring the Board to determine whether a particular fine is reasonable or excessive departs from the principles announced in *Allis-Chalmers* and *Scofield, supra.* A court-collectible fine which is levied on a union member for violating a legitimate union rule against strikebreaking is not contrary to the policies of the Act, nor does it affect the member's employment status. Moreover, where the violation occurred while the individual was a full member of the union,

he must be deemed to have contracted to abide by union rules and policies and to forego his Section 7 right to refrain from engaging in union activity. Cf. App. 39a–40a. In these circumstances, for the Board nonetheless to invalidate the fine because in its judgment it is unreasonable in amount, would require it to evaluate a matter—*i.e.*, the degree of discipline which is necessary to secure adherence to union rules—for which the Act suggests no standard, and which is the essence of union self-government.[9] In view of Congress' desire to minimize the Board's intrusion into internal union affairs (*supra*, p. 7), and the fact that the courts can adequately redress union discipline which is unduly harsh,[10] the Board properly concluded that Section 8(b)(1)(A) of the Act does not require it to assess the reasonableness of union fines.

---

[9] Thus, the court below directed the Board to take into account "[s]uch factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies * * *" (App. 29a). And see Petition in No. 71-1417, pp. 19–21.

[10] See cases the court below cited (App. 26a, n. 32). The "state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship.'" *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 193, n. 32, quoting from Summers, *Legal Limitations on Union Discipline*, 64 Harv. L.Rev. 1049, 1078 (1951). See also Sections 101 and 102 of the Landrum-Griffin Act, 29 U.S.C. 411, 412.

Contrary to the court below (App. 24a–25a), this Court's references, in *Allis-Chalmers* and *Scofield*, to "reasonable fines" are not dispositive of the issue here. In the first place, in *Allis-Chalmers* and *Scofield*, the fines levied by the union—up to $100—were conceded to be reasonable in amount (see 388 U.S. at 193, n. 30; 394 U.S. at 426 and 430). Moreover, in *Allis-Chalmers* the Court noted that state courts have fashioned remedies for unreasonable union discipline (see n. 10, *supra*), and recognized that "[t]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied" (388 U.S. at 193, n. 33, quoting *Machinists* v. *Gonzales*, 356 U.S. 617, 620).

3. The question whether the reasonableness of union fines is a relevant factor in determining their legality under Section 8(b)(1)(A) is a recurrent one in the administration of the Act. In addition to the present case and *Arrow Development Co., supra;* see *Communication Workers, Local 6222,* 186 NLRB No. 50; *United Construction Workers, Local 10,* 187 NLRB No. 99; *Tri-Rivers Marine Engineers,* 189 NLRB No. 108; *Passaic, etc. Counties Newspaper Printing Pressmen's Union No. 60,* 190 NLRB No. 38; *Teamsters Local 633,* 193 NLRB No. 84; *Int'l Ass'n of Machinists, Oakland Lodge No. 284,* 190 NLRB No. 32, pending review, No. 71–1853 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

STANLEY R. ZIRKIN,
Attorney,
National Labor Relations Board.

JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972